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Book Reviews

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BOOK REVIEWS

OIL AND GAS, Volume II, by Eugene Kuntz (a revision of THORNTON, OIL AND GAS). Cincinnati: W. H. Anderson Co., 1964. Pp. 334. $25.00.

This is a commendable addition to a fine first volume.[1] The author has been able to mold some diverse approaches to the subject matter in a manner which results in a lucid and comprehensive, yet undetailed, treatment.

Volume II is devoted to a part of the oil and gas lease, a subject upon which there is little uniformity as to form or interpretation. It is also a facet of the law in which the interrelationship of all pertinent provisions must be examined in order to ascertain their legal effect and to provide for the objectives of the parties. Professor Kuntz approaches each problem with an overview of the cases or topic to be discussed; with the frame of reference established, he examines the subject matter in depth. His approach is a selective choice of authoritative decisions, rather than an encyclopedic recitation of all cases from all jurisdictions. In the analysis of cases the treatment is factual rather than critical. There are some instances of prognostication but for the most part this volume represents a statement of the law as it is, not as it should be, nor as it may possibly be.

The law of oil and gas is unique in many ways. This accounts for the attention given the subject by diverse authors, and provides a warning for the uninitiated who seek to make analogies from settled principles in other areas of the law. Professor Kuntz underscores this uniqueness and the inherent dangers of traditional approaches to a new field of the law. For example:

> The terms of the modern oil and gas lease have been drawn from many sources to serve many very practical purposes, and such terms were obviously not chosen for the purpose of identifying the rights created with any single traditional property right or concept which can be traced from feudal land or which can be found conveniently in one of the legal pigeonholes of property or contract law.
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> In states which follow the common law, difficulty is encountered in any attempt to identify the property rights and relationship between the parties created by the oil and gas lease with any single established concept.[2]

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1. For a review of Volume I of this treatise, see Sullivan, Book Review, 39 N.D.L. REV. 255 (1963).
2. § 18.2, at 4 [of the book under review].

Extreme care must be exercised in the use of authority from other states or within the same state in oil and gas matters because of the evolution and rejection of varying approaches to this new area of the law. Historical perspective is necessary in oil and gas law if the pitfall of citing a case no longer applicable, even though not directly superseded, is to be avoided.

The reason for a rule may be difficult to find in some instances. Where the circumstances can be identified they provide a frame of reference to guide the applicability of the rule in similar situations. Professor Kuntz has analyzed the formal requirements of oil and gas leases in the light of the nature of the instrument which permits an evaluation of the extent of and the necessity for certain formalities. Thus,

> The requirement that the oil and gas lease be in writing has been predicated variously upon one or more of the propositions that it amounts to a conveyance of an interest in land and hence within the operation of statutes relating to conveyances, that it is within the provisions of the Statute of Frauds for reasons not disclosed or because it amounts to a contract either to convey an interest in land or to grant a lease for a term of years of sufficient duration to require a writing under local law, and that at common law the type of interest created by an oil and gas lease could only be created by grant which must be in writing. If the requirement of a signed writing is not fully satisfied, the lease may still be enforceable because of part performance, estoppel, or ratification.[3]

The fluidity of oil and gas law and the disparity among the states is noted throughout. To give perspective, the author provides a brief statement of the law generally, followed by a state by state analysis. Even though the text does not purport to cite or discuss every case ever decided on the subject of leases, the topics that are considered are fully developed. There is also a good description of remedies available for the protection of the lessee's interest. It is difficult to apply, by way of analogy, the doctrines that have been developed in other fields of law which are somewhat comparable to oil and gas. Here again the reason behind a particular rule may provide sufficient flexibility in the rule itself even though the subject matter to which the rule relates may not be identical. The author makes an original contribution to the law of oil and gas in the rationale which he cites for the applicability of established remedies in other areas of the law. Thus,

> If the obvious syllogistic reasoning by definition can be avoided, and if the reasons which lie behind the traditional statement of the rule are taken into account, ejectment

3. § 22.1, at 111.

> should certainly be available to an oil and gas lessee who was on the premises engaged in a drilling or producing operation, regardless of the theory entertained as to the technical classification of such inerest.[4]

Professor Kuntz proposes some solutions for current problems. For example, in the discussion of the habendum clause he suggests that leasing problems resulting from large acreage and deeper drilling may be resolved by providing for a relatively short primary term but the continuation after commercial production of other leases with the large area by the payment of increased rentals in lieu of production.[5] There are many clauses in an oil and gas lease which affect the so-called major clauses. Although these clauses are important in themselves and should be examined in depth, they are also important in terms of their principal effect, particularly upon the duration of the lease. To illustrate the relationship and the effect of these lesser clauses on the major clauses there is a discussion of the clauses and their correlation. No treatment in depth of the lesser clauses is attempted but is deferred to a later time. This preserves the continuity which the author apparently desires but at the same time gives insight into important facets that must be considered in the interpretation of a particular major clause.[6]

There is one minor criticism which should be made. Midway in the volume the author concludes that analogies from settled principles of law may be unnecessary and unduly restrictive. For example:

> Although it impairs predictability, it is probably better for the oil and gas lease to be treated as something unique, with its various incidents and its full characteristics being revealed by litigation as specific problems arise, than it is for its incidents and characteristics to be controlled by an early arbitrary classification.[7]

It is true that classification of interests in oil and gas has led to some bizarre results in some states and in confusion between cases within the same state. Nonetheless, it assists not only in predictability but also in providing guidelines for future development of law in an area or with respect to a subject matter that is entirely new. The observation by the author is made about the granting clause. There are other facets of oil and gas law where a classification will serve to reduce the chaos that currently exists, for example, royalties as rents. Perhaps the key to the author's approach is in the words "controlled by an early arbitrary classification."

4. § 25.3, at 223-224.
5. § 26.3, at 251-252.
6. § 26.13, at 312.
7. § 23.2, at 161.

Nonetheless, he has indicated elsewhere that the reason behind the rule is important; and the nature of the classification can likewise be important when used carefully.

Volume II of *Kuntz on Oil and Gas* is good; it is concise yet comprehensive; it states the law and the reasons for it; it is specific and yet it provides a correlation which is indispensible to perspective in this developing field of the law.

ROBERT E. SULLIVAN*

THE SUPREME COURT AND PUBLIC PRAYER, By Charles E. Rice. New York: Fordham University Press, 1964. Pp. xiii, 202. $5.00.

RELIGION AND THE CONSTITUTION, By Paul G. Kauper. Baton Rouge: Louisiana State University Press, 1964. Pp. viii, 137. $3.50.

"The school prayer decisions, handed down by the Supreme Court of the United States in 1962 and 1963, were wrongly decided."[1] So begins Professor Rice's carefully reasoned and well documented attack on the Court's opinions in *Engel v. Vitale*[2] and *Abington School District v. Schempp*.[3] Arguing that the framers intended no denial of the people's right to recognize God, Rice believes that the Court has committed a grievous error in outlawing prayer and Bible reading in the public schools. The error is compounded, in Rice's view, by his finding that God's aid has been invoked and acknowledged in all state constitutions and by all (save two) of our Presidents when delivering their inaugural addresses. Now, it would appear, the Court has turned its back on the American religious heritage.

While acknowledging the general worth of Professor Rice's work, one may find it necessary to take issue with him on specifics. I object to his call for good will among adherents of the several religious traditions in this country (as issued in Chapter VIII), while at other points in his text he refers to those who support the Court's prayer decisions as "militant secularizers,"[4] and treats their convictions as "the inflated scruples of a small minority."[5] One might also find fault with his description of the decisions as "lawless,"[6]

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1. RICE, at ix [of the book under review].
2. 370 U.S. 421 (1962).
3. 374 U.S. 203 (1963).
4. RICE, p. 124.
5. *Id.* at ix.
6. *Id.* at 156.

as well as his suggestion that adherence to the decisions could lead to a "servile abasement."[7]

But we may overlook such occasional stridencies. What really matters are the decisions themselves and the construction Professor Rice puts upon them. They are without precedent, Rice says, they run counter to our traditions, and they may well lead to the eventual outlawing by the Court of chaplains in the armed services, federal aid to parochial schools, and the revocation of tax benefits presently conferred on religious organizations. One cannot contest or defend opinions as yet unwritten, and thus the latter elements of Rice's arguments may be, for the time being at least, set aside.

The principal argument, it seems to me, is Rice's contention that the Court, in forbidding religious exercises in the public schools, thereby shows its preference for the non-recognition of God. This non-recognition is, in turn, seen by Rice as a preferment of another religious position, namely, that of agnosticism. Thus, the prayer decisions have the result of denying public sanction to one religious strain only to give preferment to another! And, though he makes relatively little of the point, Professor Rice considers the establishment of agnosticism as an infringement of his rights—as a member of the majority—to the free exercise of his religion. His—and the majority's—religion includes, apparently, the need for public recognition of a Supreme Being.

Now, one might suggest that the use of the machinery of government for religious purposes is exactly what the turmoil and tragedy of religious history is all about. And one could contend that a certain open-endedness with respect to ultimate questions lies four-square within the best traditions of a secular education whose prime aims are the cultivation of the free and inquiring mind. Certainly, a judicious restraint in the resolution of religious questions is no more an "establishment" of anti- or non-religion than a school teacher's studied lack of political partisanship in the classroom is an "establishment" of a non-partisan or a political civic orientation.

But better arguments than these are available. Professor Kauper, I believe, provides a view of the prayer decisions that prejudices the religious liberties of neither majority nor minority. Kauper preceives, as does Rice, the dilemma posed by the first amendment. An example or two may serve to illustrate the point. Governmental accommodation of my religious views, say the permission given to withdraw my children from school on particular holidays, may to you be an "establishment" of my religion. Likewise, public authority which grants tax privileges to your church—without which, therefore,

7. *Ibid.*

your "free exercise" rights are seriously jeopardized—may appear to me to be an "establishment" of your religion.

Professor Kauper is able to escape the dilemma by stressing that "religious liberty—broadly conceived to include all varieties of religious belief and freedom of total belief and nonbelief—is the central value served by both clauses."[8] Rather than concerning ourselves with whose religion is or is not being established, then, Kauper seems to be suggesting that the validity under the first amendment of any given governmental act has to do with the effects upon the religious freedom of those involved. If I read Professor Kauper correctly, preferment of this, that or the other religious usage seems to become a secondary question.

How does the Court stand in this regard? Kauper notes three principal theories the Court has employed: (1) the "no aid" theory (according to which government may do nothing in support of religion); (2) the "strict neutrality" rationale (stressing the constitutional inability to government to do anything which aids or hinders religion); and (3) the "accommodation" theory (which points to the necessity of government adjusting its actions to tradition or in given situations recognizing that failure to accommodate religion would result in a denial of free exercise). Which of these three theories the Court is presently following is a matter of some conjecture, but Kauper offers rather strong arguments that the majority is more inclined to accept the accommodation theses, despite the formal reliance in *Schempp* on the strict neutrality doctrine.

On the other hand, though, Kauper is quick to indicate that the three theories are not mutually exclusive and that, further, the accommodation principle might well be viewed as a modification of the other theories. He suggests that accommodation, in avoiding the absolutism of "no aid" and "strict neutrality," may be viewed "as the larger or benevolent neutrality."[9] Applying such principle Kauper writes that

> [W]hatever else government may or may not do, it is required to respect religious liberty. This means, first of all, that it must refrain from laws that restrict the free exercise of religion or which discriminate on religious grounds in the granting of rights and privileges, unless clearly defined policy grounds warrant such discrimination. It further means that since religious liberty occupies a preferred position in the constellation of constitutional freedoms the legislature in exercising its discretionary authority may in some situations grant a special advantage or immunity

8. KAUPER, p. 77.
9. *Id.* at 75.

on religious grounds in order to facilitate the free exercise of religion.[10]

Our discussions which tend to develop from inter-religious contest, as well as our conception of government as a silent observer of the debate, may well be beside the point. The role of government, if Kauper's views were to prevail, would be one of avoiding undue restrictions on religious exercise, necessitating in specific circumstances certain accommodations to the needs of individual religious viewpoints. Government is not thus confined to a "no aid" or "strict neutrality" posture, difficult if not impossible to maintain. It is, rather, committed to the defense of a religious pluralism and may, from time to time, provide positive support where the maintenance of diversity in the nation's spiritual life is threatened.

Professor Kauper concludes his discussion of what he calls "the interrelationship of the civil and religious communities"[11] with an examination of selected policy alternatives faced by both government and the churches in coming to terms with each other and with the issues developing in a religiously diverse society. In contrast to Rice's somewhat alarmist views, Kauper maintains a measured optimism and faith in the abilities and good will of both communities.

To be sure, there are no easy answers to questions involving ultimate values and how these are to be searched out and defended in an open society. Both Rice and Kauper are seriously concerned and both contribute in their own ways to an important dialogue. Kauper's last sentence reads:[12] "To bring fresh, creative, critical, and constructive thought to bear in the establishment of . . . consensus is the responsibility and the task with which we are challenged." Both authors have met the challenge and both deserve to be read and discussed.

JAMES HERNDON*

A SUPREME COURT JUSTICE IS APPOINTED, By David J. Danelski. New York: Random House, 1964. Pp. x, 242, $2.95 (paperback).

JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS, By A. L. Todd. New York: McGraw-Hill Book Co., 1964. Pp. ix, 275, $6.50.

In *A Supreme Court Justice Is Appointed* and *Justice on Trial*, we are presented with case-studies of the appointments of Pierce Butler and Louis Brandeis to the Supreme Court. That Butler and

10. *Id.* at 77.
11. *Id.* at 4.
12. *Id.* at 12.

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Brandeis were members of the Supreme Court together,[1] and that several members of the *dramatis personnae, e.g.*, Senator Walsh of Montana and former President, then Chief Justice Taft, have roles in both stories, make the books interesting to read in concert and provide comparative insights into the appointment process. The two men differed fundamentally in outlook, but that is not what differentiates the two books. Both authors are concerned with describing the process by which the nominations were contested. Todd, a free-lance writer, is primarily concerned with telling a story in considerable detail; his approach is essentially historical. Danelski, on the other hand, while presenting a thorough description of events, is interested in far more: analyzing, using the political scientist's conceptual tools, and developing a theory of explanation not only for judicial appointments but also for other political phenomena. Because Danelski does much more than simply tell a story, his volume is by far the superior of the two, although Todd does add to our knowledge of the controversy over Brandeis' nomination.

Perhaps the points at which the greatest comparison can be made are the reactions to the two appointments and the manner in which the battles for confirmation were fought. The campaign on Butler's behalf in 1922 was stimulated by executive officials, including Attorney-General Daugherty, and by Chief Justice Taft, because Butler was not extremely well-known outside Minnesota at the time of his nomination.[2] Support also had to be solicited to counter the pressure for the appointment of Martin Manton of New York, like Butler a Catholic; in this connection, we are provided with some insights into the participation by the Catholic hierarchy in the endorsement of Catholic aspirants to office. Todd gives us far less mention of the workings of those in behalf of Brandeis; we have only a brief, tantalizing mention of Brandeis' "friendly board of strategy,"[3] although it is clear that the pro-Brandeis forces used the device of providing staff assistance to the Senate committee rather than simply making representations in their candidate's behalf.

The campaign against Brandeis' confirmation was highly organized, with Senator Lodge soliciting and stimulating anti-Brandeis material. Much opposition developed spontaneously in addition to that solicited; this may be accounted for because it was directed *against* a controversial figure rather than *in behalf of* a somewhat less embroiled individual. Those fighting Brandeis' appointment were well-placed in society, and included many leaders of the American bar. When Taft and others wrote an anti-Brandeis letter, "no such rallying of the leaders of the American bar had been seen

1. Brandeis, 1916-1939; Butler, 1922-1939.
2. DANELSKI, pp. 56 *ff* [of the book under review].
3. TODD, p. 114.

in the capitol before, on any issue."[4] These men also utilized a lobbyist to carry on their day-to-day work, perhaps the first time this had been done in connection with a Supreme Court appointment. By comparison, Butler's principal opponents were several former instructors at the University of Minnesota who felt they had been dismissed as a result of Butler's action as a member of the University's Board of Regents.[5] The issues involving the two men were different, also. In Brandeis' case, the allegations were of legal misconduct; in Butler's, the misconduct charged was that connected with another role (Regent) which allegedly reflected on his "judicial temperament."

The handling of Senatorial hearings in the two cases is enlightening. The Senators were not particularly responsive to the charges brought against Butler (through Senator-elect Henrik Shipstead), arguing that they could not investigate the Board of Regents of the University of Minnesota and that Butler was only one of many Regents. The Brandeis hearings, on the other hand, went on for six weeks; the unhappiness of law and business leaders was neither fully manifested nor did it have much impact on the nomination during that time. However, the delay served the interests of Brandeis' opponents, who created an impression that Brandeis was involved in wrong-doing simply by the number of charges made and the sheer volume of effort expended.[6]

Both episodes provide interesting sidelights on the involvement of the academic community in the judicial appointment process and on academic freedom issues. These bulk larger in the Danelski volume, but arise in the Todd study through Harvard President Lowell's opposition to Brandeis and a counterpetition by Harvard students. While it appears from Danelski's description that the Minnesota Regents did not fully understand the concepts of academic freedom and due process, the Harvard law faculty were able to oppose their President's stand without trepidation—Lowell even promoted Pound to Dean during the Brandeis controversy despite differences of the two over the nomination.[7]

One of the high points of the Todd volume is the sidelight cast on Taft's desire for appointment to the Supreme Court and the opportunities with which he was presented.[8] The pressure for his appointment to the seat vacated by Justice Lamar is really a case study within a case study, and a good example of pressure for a nomination ultimately not made. In this regard, it is comparable to the pro-Manton pressure portrayed by Danelski. The pressure

4. *Id.* at 160.
5. DANELSKI, pp. 94 *ff.*
6. TODD, p. 167.
7. *Id.* at 258 n.
8. *Id.* at 21 *ff.*

for Taft's early appointment provided President Wilson with an opportunity to consider the criteria for a "good" judge, perhaps indirectly affecting the subsequent Brandeis appointment.

Todd's treatment of Brandeis enlarges the usual constitutional law view of the man, although it is clear that, in contrast to Butler, who had a more conventional law practice, Brandeis was highly involved in large-scale public law matters and had an impact on public law long before his nomination through, for example, his participation in the Oregon maximum hours case[9] and the development of the "Brandeis brief." The description of Brandeis' writing activities, his relations with the Progressives, and his role as lobbyist and mediator also expand our view of the man. Insufficient treatment is given, however, to his role in the New York garment workers industry, particularly his establishment of and participation on that industry's arbitration board. This is an important omission because the information is relevant to the issue of Brandeis' "judicial temperament."

We are given exposure to the question of Brandeis as a Jew, and have in Todd's volume what amounts to a study in the meaning of religious identification. A number of leaders of the Jewish community opposed Brandeis' appointment because they felt him a Johnny-come-lately and thought he was using Zionism for his own ends.[10] One should note, also, Taft's comments on Brandeis not being a good Jew. Todd explores thoroughly, without making it an overriding feature, the specific impact of anti-Semitism in politics; we get better perspective on the role of prejudice because it is not the primary theme of the study.

Justice on Trial, while at times unexciting because of the amount of detail, seems to be based on solid scholarship. One primary weakness, in telling the story of the nomination, is that little concerning Wilson is presented which could explain his decision to nominate Brandeis. This omission may stem from the emphasis on the fight over the nomination; however, we are given a good picture of the general political setting in Brandeis' time and an adequate treatment of the ideological mood of the Court. Danelski's attention to Harding's and Daugherty's complementary personalities as explanatory factors in the Butler appointment[11] illustrates, I think, the need for more knowledge about Wilson to complete an otherwise good description of the Brandeis appointment.

Danelski provides us with a very special study by supplementing the conventional biography and description of the nomination and confirmation we would expect to find. In his opening biographical materials on Butler, for example, Danelski makes use of content

9. Muller v. Oregon, 208 U.S. 412 (1908).
10. TODD, p. 217.
11. DANELSKI, pp. 167-169.

analysis of Butler's speeches to delineate the primary values in which Butler believed.[12] We come to these again at the end of the volume, in an analysis aided by scaling of cases in which Butler participated, where his previously stated values are found to be, on the whole, highly related to his decisions on the Supreme Court.[13] Of particular interest to students of constitutional law should be Danelski's finding that Butler was a champion of procedural due process, despite the feelings of disgruntled former Minnesota faculty, but that his record on substantive issues of freedom was frequently pro-government rather than pro-individual. The competing value of "patriotism" outweighed the value of "freedom" in these latter cases.[14] The Progressives' expectation that Butler would side with railroads and utilities was borne out, Butler's role in these cases[15] being strengthened through the Justices' practice of turning for advice to colleagues regarded as experts in a particular subject.[16]

In summary, Todd and Danelski provide two important additions to the literature on the Supreme Court, with quite complete descriptions of appointment and confirmation. Danelski has gone beyond this through the utilization or social science tools and by elaboration of a theoretical scheme for analyzing and explaining such phenomena. Both volumes should be read by students of public law and the judicial process.

STEPHEN L. WASBY*

LAWYERS IN POLITICS: A STUDY IN PROFESSIONAL CONVERGENCE, By Heinz Eulau and John D. Sprague. Indianapolis: Bobbs-Merrill Co., 1964. Pp. 164, $5.00.

"Scratch a lawyer and you'll find a politician" says the old maxim, ample testimony to the fact that many politicians are lawyers. Considerable effort has been expended in an attempt to explain the predominance of the lawyer in politics by the authors Eulau and Sprague. Their work is an attempt by two political scientists to account for the disproportionate number of lawyers in state

12. *Id* at 15 *ff*.
13. *Id.* at 181.
14. *E.g.*, Schwimmer v. United States, 279 U.S. 644 (1929).
15. See DANELSKI, p. 188 (scalogram).
16. *Id.* at 187.

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legislatures. Re-analysis of data collected in a 1957 study[1] of state legislators suggested to the authors the usefulness of the idea of "professional convergence" as an explanation of the dominance of the lawyer among the occupational groups in legislative chambers.

In the authors' view, a profession is a social grouping with a corresponding set of behavior requirements which individuals who are members or practitioners of the grouping must meet. Law is a profession and, say the authors, politics may be considered a profession for some individuals. Because both the profession of law and the professional pursuit of politics (in this case the attainment of the position of legislator) involve independence of action, a code of ethics and a norm of public service, they may be termed convergent. Thus, the similarity of the professions of law and politics accounts for the members of the one group also being members of the other group.

The authors review, and reject as inadequate, the traditional explanations of the predominance of the lawyer in politics: that the class position of lawyers and various features of the class structure lead to the predominance of lawyers in politics,[2] that the independence of the lawyer in a modern capitalist economy leads to their dominance in political life, and that the monopolization of law enforcement offices by lawyers places members of the legal profession in a favorable position to occupy allied political offices and also leads to their predominance in state legislatures. On the contrary, say Eulau and Sprague, professional convergence is a more complete explanation of the fact that many legislators are also lawyers. Law and politics are compatible activities. Moreover, while politics may be the temporary diversion of a lawyer, law and legal training may be seen as one way of gaining entrance into, or maintaining one's self in, the political world. In addition, both occupations are characterized by moral obligation entailing public service; both may be viewed as consisting of clientele-professional relationships (lawyers have clients, legislators have constituents); and both have a "code" prescribing proper behavior. To the extent that the roles of lawyer and legislator are similar in these crucial aspects, the authors assert there exists convergence between the professions of lawyer and politician-legislator.

This study by Eulau and Sprague will receive careful and critical reading by political scientists and sociologists. Objections might

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Professors John C. Wahlke, William Buchanan, LeRoy C. Ferguson and Heinz Eulau extensively studied the social characteristics of the membership and the operations of the legislatures of California, New Jersey, Ohio and Tennessee. Their findings were published in THE LEGISLATIVE SYSTEM: EXPLORATIONS IN LEGISLATIVE BEHAVIOR (1962). The Study by Eulau and Sprague examines the same data but with a different purpose in mind.

2. Alexis de Tocqueville's explanation is discussed by Eulau and Sprague on pp. 32-39; Max Weber's explanation on pp. 39-50; Joseph A. Schlesinger's explanation on pp. 50-53.

be directed to the loose use and application of the term "isomorphism,"[3] and the cavalier interpretation of percentage differences. The most alarming difficulty, however, is connected with the major contribution of the authors—the explanatory power of the notion of professional convergence. The authors have discarded the traditional explanations of the lawyer in politics and given us a surrogate. But how adequate is the substitute?

The appearance of the lawyer in politics results from a convergence of the role requirements of the professions of law and politics fused through the operations of the political system. At the same time, there is no attention given to the way in which lawyers become legislators. Professional convergence provides no answer but is, itself, problematic. Even if the notion of professional convergence is later demonstrated with appropriate data to be a valid description, it cannot by its nature alone account for the movement of lawyers into politics. Perhaps professional convergence along with the "partial explanations" previously discarded by the authors will, in the aggregate, provide a more complete explanation of the lawyer in politics than either of the explanations considered alone.

In closing, there is nothing here that will be helpful in the practice of law; additionally, this is a work written in the mainstream of contemporary social science containing an abstract, and to lawyers probably unfamiliar, analytical approach. Because of this, and the fact that the writing bristles with technical terms, *Lawyers In Politics: A Study in Professional Convergence* is likely to be difficult and unrewarding reading for the average lawyer.

RICHARD SUTTON*

THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER, By Richard A. Falk. Syracuse: Syracuse University Press, 1964. Pp. xvi, 184, $6.50.

It has been nearly four years since the United States and the Soviet Union formally stated their agreement that the goal of multilateral disarmament negotiations should be in a world in which disarmament is "general and complete," and in which disarmament is accompanied by "reliable procedures" for the peaceful settlement of disputes and by "effective arrangements" for the maintenance

3. Isomorphism simply defined means "of one form." The occupations of law and politics assume the same "one form" for the authors as both professions require independence of action, and have a code of ethics and a norm of action.

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of peace.[1] These four years have brought some small beginnings in limiting or slowing the pace of the arms race, as with, for example, the Test Ban Treaty[2] and the General Assembly resolution concerning the placing of weapons of mass destruction in outer space,[3] but no progress has been visible toward reliable peaceful settlement procedures or toward effective peace-keeping arrangements. The world must still shudder every time some aspiring politician in an otherwise unimportant country seeks favor with the electorate by arousing dormant claims against a neighboring country, or every time angry young men in such a country turn to the Soviet Union, Communist China or the CIA for material support against their existing government. In this sixth decade of the twentieth century the major nuclear powers have seemed unwilling to insulate any dispute in any part of the world from the basic antagonisms of the cold war.[4]

It is against this background that Professor Falk attempts to define the role that the domestic courts of every country ought to play in applying and developing rules of public international law. Professor Falk rightly regards domestic courts as having a dual role in international law cases: to act both as agents of the international order, and as institutions of the national order.[5] He urges that as agents of the international order, domestic courts "work out formal rules that will accord respect to rival social systems that act within their own sphere of competence."[6] This process is relevant to the cold war because by "settling legal controversies in a manner that protects the autonomy of opposed social and political systems," domestic courts would "demonstrate that a basis for trust really does exist."[7] The suggested rules are as follows:

> [I]n general, municipal courts should avoid interference in the domestic affairs of other states when the subject matter of disputes illustrates a legitimate diversity of values

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1. The Soviet-U.S. agreement on principles for disarmament negotiations was contained in a report by these states to the General Assembly. *Joint Statement of Agreed Principles for Disarmament Negotiations*, U.N. Doc. No. A/4879 (1961), reprinted in DEP'T OF STATE, DOCUMENTS ON DISARMAMENT, 1961, at 439-42 (1962). The seventh principle reads in part as follows: "Progress in disarmament should be accompanied by measures to strengthen institutions for maintaining peace and the settlement of international disputes by peaceful means. . . . [T]he necessary measures [should be taken] to maintain international peace and security, including the obligation of States to place at the disposal of the United Nations agreed manpower necessary for an international peace force to be equipped with agreed types of armaments. Arrangements for the use of this force should ensure that the United Nations can effectively deter or suppress any threat or use of arms in violation of the purposes and principles of the United Nations." *Id.* at 441.

2. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. & O.I.A. 1313, T.I.A.S. No. 5433.

3. General Assembly Res. 1884 (XVIII), Oct. 17, 1963, U.N. GEN. ASS. OFF. REC., 18th Sess., Supp. No. 15, at 13 (A/5515) (1963). The resolution welcomed the expressions by the United States and the Soviet Union "of their intention not to station in outer space any objects carrying nuclear weapons or other kinds of weapons of mass destruction." *Ibid.*

4. See, *e.g.*, Partan, *Reducing International Tension Through the Settlement of Peripheral Conflict* (1964) (Research Memorandum, Rule of Law Research Center, Duke University).

5. P. 72 [of the book under review].

6. P. 71.

7. P. 72.

> on the part of two national societies. In contrast, if diversity can be said to be illegitimate, as when it exhibits an abuse of universal human rights, then domestic courts fulfill their role by refusing to further the policy of the foreign legal system. In instances of illegitimate diversity, where a genuine universal sentiment exists, then the domestic courts properly act as agents of international order only if they give maximum effect to such universality.[8]

Where the diversity of values is "legitimate," the courts of the forum state ought to defer to the policies of the foreign state in international law cases, but where the diversity is "illegitimate," the courts of the forum state ought vigorously to enforce the accepted international standard, and in either case the domestic court ought to arrive at its result as independently of executive policy as is possible.[9] In this way law might be used as a "creative force in the struggle to establish trust."[10]

Much of Professor Falk's discussion centers on the extent to which courts in the United States ought to respect foreign decrees expropriating property owned by United States nationals, and on the lower court opinions in the recent *Sabbatino* case.[11] Falk considers the area of economic legislation, including the status of foreign-owned private property, as clearly within the area of "legitimate diversity" between competing social systems, basing his judgment on "considerations of international stability and ethical tolerance."[12] This judgment is derived from the postulate that "the existence of capitalist and socialist national societies is an instance of legitimate diversity" which requires that domestic courts treat any resulting controversy "with tolerance and respect, developing principles of self-restraint and justifying interferences with foreign economic policy by reference to variables such as extra-territoriality rather than to differences implicit in the contrasting status of property in the two societies."[13] In other words, in an effort to demonstrate that international law as applied by a United States court means something more than the political policies of

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8. *Ibid.*

9. See pp. 86-96. Falk notes that the traditional view that "the nation should speak with one voice in the area of foreign affairs . . . assumes that there is an univocal meaning of 'national interest' applicable in every political and legal situation [and] overlooks the 'national interest' that inheres in the growth of international law." P. 92.

10. P. 69.

11. Falk's book was completed prior to the Supreme Court's decision in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The Supreme Court held in *Sabbatino* that the "Act of State" doctrine applied to preclude judicial review of the Cuban expropriations there involved, reversing the result reached by the Court of Appeals, 307 F.2d 845 (2d Cir. 1962), and by the District Court, 193 F. Supp. 375 (S.D. N.Y. 1961). The Supreme Court phrased its decision as holding that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." 376 U.S. at 428. For discussion, see, *e.g.*, Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935 (1964); and Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964).

12. P. 106.

13. Pp. 72-73.

the United States implemented in a judicial setting, and by this process to add to the growth and stature of the international legal system, United States courts should decline to substitute their own view of the substantive requirements of international law for that acted upon by the expropriating state. This practice would in effect be an international "Act of State" doctrine, holding that the "courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[14] The result is based more on the fact that the question arises out of the ideology or policies of a powerful bloc of states than on doubt as to the continued existence of the asserted substantive international law requirement of "prompt, adequate, and effective payment"[15] for expropriated property.

This is not the place to discuss the substantive law governing expropriations of foreign-owned property.[16] In considering whether domestic courts of capital-exporting countries ought to hear cases involving foreign expropriations, however, it is important to note that there is no agreement as to the customary international law limits on the power of a state to expropriate, and that the Communist countries reject the asserted obligation to compensate the aliens concerned.[17] Does this mean that whatever international law standard may have existed as to compensation ought not to be applied to the Communist countries, or to any country rejecting that standard? Professor Falk writes that

> The supremacy of national law within national territory is regarded as an established reality, except in those instances in which there is among states a strong consensus . . ., and this consensus must include the most powerful states. Where diversity exists, common standards are both ineffective and inappropriate, at least so long as the enunciation, the application, and the enforcement of international standards cannot be entrusted reliably to central institutions . . .[18]

Where there is no consensus, or where the consensus has evaporated, the prevailing diversity should be respected by national courts as their contribution to the growth of trust between conflicting social systems. The national court need not accept the view of substantive international law implicit in the act of the foreign state, but in

14. Underhill v. Hernandez, 168 U.S. 250, 252 (1897). The Court went on to say that "Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Ibid.* See also the *Sabbatino* formulation, *supra* note 11. *Sabbatino* held that the "Act of State" doctrine is not required by international law. 376 U.S. at 421.

15. The quoted language is from a 1938 Note from Secretary Hull to the Mexican Ambassador, 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 658-59 (1942).

16. *Sabbatino* involved claims that the Cuban expropriation decree violated international law on three grounds: that it was an act of retaliation against the United States government, and hence not a taking for a public purpose; that it discriminated against United States nationals; that it failed to provide adequate compensation. See *Supra* note 11.

17. See, *e.g.*, the authorities cited by the Supreme Court in *Sabbatino*, 376 U.S. at 428-29, n. 26-31.

18. Pp. 170-71.

fulfillment of its role as an agent of the international order, the national court should respect the competence of the foreign state to undertake the act in question.[19]

A major difficulty in applying Professor Falk's thesis would be presented by an effort to determine whether the "diversity" involved in a particular case is "legitimate" or "illegitimate." If, as indicated, legitimacy results from differences in outlook of contesting social systems, and from the power positions of the dissenting states, when would it ever be appropriate for a United States court to view a particular diversity as illegitimate? Falk broadly distinguishes between human rights standards and economic policies, suggesting that legitimate diversity embraces the latter, but not the former. This distinction may adequately settle the scope of review of the rare human rights question that reaches a foreign court, but it gives little guidance in the more usual case involving diversity in the treatment of foreign-owned property. For example, Falk suggests that the Cuban decree involved in the *Sabbatino* case falls outside of the domain of legitimate diversity since it expropriated only the property of United States nationals, and since there is "respectable international authority" to support a conclusion that discriminatory takings violate international law.[20] Respectable authority would not be enough, however, if it is both "ineffective and inappropriate" for a national court to apply common standards where powerful states dissent.[21]

The *Sabbatino* case indicates primary concern with a differing element in the problem of national court application of international law standards in today's world. The Supreme Court, as has been noted, applied the "Act of State" doctrine to decline to review the compatibility of the Cuban expropriation with international law standards.[22] In so holding, the Court emphasized both the existing disagreement between capitalist and Communist states as to the applicable international law standards, and the delicate and important implications of any potential court decision for the foreign relations of the United States.[23] The Court reiterated the *Baker v. Carr* dictum that not every case that touches foreign relations lies beyond judicial cognizance,[24] and held that the "Act of State"

19. A supranational court would of course be competent to review the substantive law aspects of the expropriation, but in Falk's view even the supranational forum should "avoid an obsolescent application of international standards that expresses an older, but now nonexistent, consensus." P. 74.

20. Pp. 110-11.

21. Falk considers that "where uniformity exists to support political majorities in international institutions," apparently including the most powerful states, common standards may be applied even if "such standards override the fundamental policies of the national governments," apparently meaning those that do not subscribe to the supposed consensus. Where diversity exists, writes Falk, "the role of international law is confined to the tasks of making rules of deference explicit and uniform and of formulating mutually acceptable ways to delimit the domain of national competence." P. 171.

22. See *supra* notes 11, 16.

23. 376 U.S. at 427-37.

24. Baker v. Carr, 369 U.S. 186, 211 (1962); quoted, 376 U.S. at 423.

doctrine is not required by international law,[25] but found that the doctrine does have "constitutional underpinnings" arising out of "the basic relationships between branches of government in a system of separation of powers."[26] The Court was careful not to indicate that its decisions in this area must always follow executive policy, but exhibited concern that the involvement of the judiciary in passing on the validity of foreign acts of state might "hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole . . .,"[27] and pointed out that in several ways the Executive is better qualified than the courts to deal with asserted breaches of international law by foreign states. The Court noted that judicial determinations can reach only such property as fortuitously comes into the United States, whereas the Executive speaks for all claimants in diplomatic negotiations with the expropriating state.[28] More significantly from the point of view of the development of international law, the Court emphasized that

> When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.[29]

Rather than endeavoring to characterize differences in outlook as legitimate or illegitimate, the Supreme Court's concern is with the impact of its activity on the Executive and on the Executive's foreign affairs responsibilities. The Court notes that it is a "sensitive task" to establish principles "not inconsistent with the national interest or with international justice" where diversity exists, and that, even apart from diversity as to the applicable substantive law, the importance of the issue for foreign relations must be weighed in deciding whether it should be decided by United States courts.[30]

Although the rhetoric of the *Sabbatino* case includes references to the needs of the community of nations, the controlling consideration seems to be the division of functions between the Executive and the Judiciary within the national government, and not the role of the courts as agents of the international community. If *Sabbatino* erred toward this form of provincialism, however, it at least avoided the pretense of impartial decision of politicially important international law questions. That even this measure of independence is not desired by powerful elements in the national society is shown by the

25. 376 U.S. at 421. On the constitutional law basis of the "Act of State" doctrine, see Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805 (1964).

26. 376 U.S. at 423.

27. *Ibid.*

28. *Id.* at 431-32.

29. *Id.* at 432-33.

30. *Id.* at 428.

ensuing Act of Congress[31] directing the courts to abandon the "Act of State" doctrine in expropriation cases.

So long as states continue in their hesitancy to submit to the jurisdiction of the International Court of Justice, domestic courts must bear the major judicial burden of developing and applying international law. There is no end to defining exactly what that role ought to be in the varient situations in which the question arises, but Professor Falk has made a major contribution to clarity in thought, and especially to an understanding of the limits on the effectiveness of national adjudication in the development of world order.

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31. Foreign Assistance Act of 1964 78 Stat. 1013. The Executive supported adherence to the "Act of State" doctrine in *Sabbatino*, and opposed the Act of Congress, which expires on January 1, 1966. It should be noted that the application of the "Act of State" doctrine in *Sabbatino* does not result in a transfer of the assets involved to Cuba. The United States has issued Treasury Regulations freezing Cuban assets in this country and blocking transfers of property interests to Cuba or to Cuban nationals. See Cuban Assets Control Regulations, 31 C.F.R. 515.101-.808 (1964). In essence, therefore, the *Sabbatino* litigation may be viewed as an effort to resolve a conflict in interest between the individual claimants to the particular assets before the court and the entire class of United States nationals from whom Cuba has taken property, and who might therefore share in the ultimate disposition to be made of all Cuban assets controlled by the United States government.

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